

LABOR SERVICES DIVISION[875]

Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 89A.3, the Elevator Safety Board hereby gives Notice of Intended Action to amend Chapter 65, “Elevator Safety Board Administrative and Regulatory Authority,” Chapter 66, “Waivers or Variances from Administrative Rules by the Elevator Safety Board,” Chapter 67, “Elevator Safety Board Petitions for Rule Making,” Chapter 68, “Declaratory Orders by the Elevator Safety Board,” Chapter 69, “Contested Cases Before the Elevator Safety Board,” and Chapter 70, “Public Records and Fair Information Practices of the Elevator Safety Board,” Iowa Administrative Code.

These amendments make editorial and technical changes; adopt a definition of “conveyance”; require that a petitioner use the appropriate Board form to petition for board action; change the language concerning public comment during board meetings; clarify procedures for informal review of inspection reports; set forth procedures for an appeal from an action by the Labor Commissioner to suspend, deny or revoke an operating permit; and clarify procedures for issuance of a subpoena during a contested case.

The purposes of these amendments are to protect the health and safety of the public, make the rules more clear, align the language with the authority of Iowa Code chapters 17A and 89A, and implement legislative intent.

If requested in accordance with Iowa Code section 17A.4(1)“b” by the close of business on December 22, 2009, a public hearing will be held on December 23, 2009, at 9 a.m. in the Capitol View Room at 1000 East Grand Avenue, Des Moines, Iowa. Interested persons will be given the opportunity to make oral statements and file documents concerning the proposed amendments. The facility for the oral presentations is accessible to and functional for persons with physical disabilities. Persons who have special requirements should call (515)242-5869 in advance to arrange access or other needed services.

Written data, views, or arguments to be considered in adoption shall be submitted by interested persons no later than December 23, 2009, to Division of Labor Services, 1000 East Grand Avenue, Des Moines, Iowa 50319-0209. Comments may be sent electronically to kathleen.uehling@iwd.iowa.gov.

These amendments are intended to implement Iowa Code chapter 89A.

The following amendments are proposed.

ITEM 1. Amend rule 875—65.1(89A) as follows:

875—65.1(89A) Definitions. The definitions contained in this rule apply to 875—Chapters 65 to 73.

“Board” means the elevator safety board.

“Board office” means the offices of the division of labor services of the department of workforce development.

“Commissioner” means the labor commissioner of the state of Iowa.

“Conveyance” means an elevator, construction personnel hoist, dumbwaiter, escalator, moving walk, lift or inclined or vertical wheelchair lift subject to regulation under Iowa Code chapter 89A, and includes hoistways, rails, guides, and all other related mechanical and electrical equipment.

ITEM 2. Rescind rule 875—65.2(89A) and adopt the following **new** rule in lieu thereof:

875—65.2(89A) Purpose and authority of board. The purpose of the board is to perform statutory duties pursuant to Iowa Code chapter 89A. The mission of the board is to protect the public health,

safety and welfare relating to the safe and proper installation, repair, maintenance, alteration, use, and operation of conveyances in the state. The authority and responsibilities of the board include, but are not limited to:

65.2(1) Adopting rules necessary to protect public health, safety and welfare and to administer the duties of the board.

65.2(2) Hearing and deciding appeals concerning inspection reports that relate to the installation, operation, and maintenance of conveyances in the state.

65.2(3) Hearing and deciding appeals concerning actions by the commissioner to deny, suspend or revoke operating permits.

65.2(4) Establishing fees.

65.2(5) Establishing committees of the board, the members and chairpersons of which shall be appointed by the board chairperson.

65.2(6) Performing any other function authorized by law.

ITEM 3. Rescind subrule **65.3(4)**.

ITEM 4. Amend subrules 65.4(5) and 65.4(6) as follows:

65.4(5) Members of the public may be present during board meetings unless the board votes to hold a closed session in accordance with Iowa Code chapter 21. The dates and locations of board meetings may be obtained from the division of labor's Web site or ~~directly from~~ the board office.

65.4(6) At every regularly scheduled board meeting, time will be designated for public comment. During the public comment period, any person may speak for up to two minutes. Requests to speak for two minutes per person ~~later in the meeting~~ when a particular topic comes before the board ~~should be made at the time of the public comment period and will~~ may be granted at the discretion of the chairperson. ~~No more than ten minutes will be allotted for public comment at any one time unless the chairperson indicates otherwise. Persons who have not asked to address the board during the public comment period may raise their hands to be recognized by the chairperson. Acknowledgment and an opportunity to speak will be at the discretion of the chairperson.~~ The chairperson may limit total public comment time to ten minutes.

ITEM 5. Amend rule 875—66.3(17A,89A), introductory paragraph, as follows:

875—66.3(17A,89A) Criteria for waiver or variance. In response to a petition completed pursuant to this chapter, the board may, in its sole discretion, issue an order waiving, in whole or in part, the requirements of a rule as applied to an identified person on the basis of the particular circumstances of that person if the board finds, based on clear and convincing evidence, all of the following:

ITEM 6. Amend subrule 66.4(3) as follows:

66.4(3) Filing petition. A petition is deemed filed when it is received in the board's office. A petition should be sent to the Elevator Safety Board, Department of Workforce Development, Division of Labor Services, 1000 East Grand Avenue, Des Moines, Iowa 50319. The petitioner shall submit the petition and all related materials for consideration at least three weeks prior to a scheduled board meeting for board review of the petition at the meeting.

ITEM 7. Amend rule 875—66.5(17A,89A), introductory paragraph, as follows:

875—66.5(17A,89A) Content of petition. The required form for a petition for waiver or variance is available on the board's Web site at <http://www.iowaworkforce.org/labor/elevatorboard.htm>. A petition for waiver shall include the following information where applicable and known to the ~~requester~~ petitioner:

ITEM 8. Amend subrules 66.5(5), 66.5(6), 66.5(10) and 66.5(11) as follows:

66.5(5) A history of any prior contacts between the board, other departments or agencies of the state of Iowa, or political subdivisions and the petitioner relating to the ~~elevator, escalator, or other equipment~~ conveyance affected by the proposed waiver.

~~66.5(6) Any information known to the requester~~ Information regarding the board's action in similar cases.

~~66.5(10) Signed releases of information authorizing persons with knowledge regarding the request~~ petition to furnish the board with information relevant to the petition for waiver.

~~66.5(11) The state identification number of the elevator, escalator, or related equipment conveyance.~~

ITEM 9. Amend rule 875—66.6(17A,89A) as follows:

875—66.6(17A,89A) Additional information. Prior to issuing an order granting or denying a waiver, the board may request additional information from the petitioner relative to the petition and surrounding circumstances. If the petition was not filed in a contested case, the board may, on its own motion or at the petitioner's request, schedule a telephonic or in-person meeting between the petitioner and a representative or representatives of the board related to the waiver request. ~~The petitioner must submit all materials for consideration at least three weeks prior to board review.~~

ITEM 10. Amend rule 875—67.1(17A,89A), introductory paragraph, as follows:

875—67.1(17A,89A) Petitions for rule making. Any person or agency may file a petition for rule making with the board requesting the adoption, amendment or repeal of a rule. The required form for a petition for rule making is available on the board's Web site at <http://www.iowaworkforce.org/labor/elevatorboard.htm>. The petition shall be filed at the location specified in rule 875—65.5(89A). A petition is deemed filed when it is received by the board office. The board office shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the board an extra copy for this purpose. The petition must be in writing and provide the following information where applicable and known to the ~~requester~~ petitioner:

ITEM 11. Amend subrule 67.1(7) as follows:

67.1(7) The board may deny a petition because it does not provide the required information. The petitioner may file a new petition on the same subject that seeks to eliminate the grounds for the board's rejection.

ITEM 12. Amend subrule 68.1(1), introductory paragraph, as follows:

68.1(1) The required form for a petition for declaratory order is available on the board's Web site at <http://www.iowaworkforce.org/labor/elevatorboard.htm>. The petition must be in writing and provide the following information where applicable and known to the ~~requester~~ petitioner:

ITEM 13. Amend paragraph **68.1(1)“c”** as follows:

c. The Clear and concise questions the petitioner wants answered, stated clearly and concisely the board to answer.

ITEM 14. Amend subrules 68.3(1) and 68.3(2) as follows:

68.3(1) Persons A person who qualify qualifies under any applicable provision of law as an intervenor and who ~~file~~ files a petition for intervention within 20 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

68.3(2) Any At the board's discretion, a person who files a petition for intervention at any time more than 20 days after the filing of a petition for declaratory order but prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order ~~at the discretion of the board.~~

ITEM 15. Rescind rule 875—68.7(17A,89A) and adopt the following new rule in lieu thereof:

875—68.7(17A,89A) Board review procedures.

68.7(1) Within 30 days after receipt of a petition for a declaratory order, the board shall issue a document that does one of the following:

- a. Declares the applicability of the statute, rule or order to the specified circumstances,
- b. Sets the matter for specific proceedings,
- c. Agrees to issue a declaratory order by a specified time, or

d. Declines to issue a declaratory order and sets forth the reasons for its actions as provided in subrule 68.9(1).

68.7(2) The board may request the petitioner to submit additional information or argument concerning the petition. The board may also solicit comments from any person on the substance of the petition. Also, comments on the substance of the petition may be submitted to the board by any person.

68.7(3) The petitioner and all intervenors shall be provided a reasonable opportunity to make a presentation to the board. The length of time allotted for presentation shall be reasonable in light of the complexity and number of issues involved.

ITEM 16. Rescind and reserve rule **875—68.8(17A,89A)**.

ITEM 17. Rescind and reserve paragraph **68.9(1)“b.”**

ITEM 18. Amend rule 875—69.1(17A,89A), introductory paragraph, as follows:

875—69.1(17A,89A) Reconsideration of inspection report. The owner or operator of a piece of equipment subject to a written inspection report may, ~~within 30 days of the issuance of the report,~~ petition the commissioner for reconsideration of the report within 30 days of the issuance of the report. Failure to seek timely reconsideration of the inspection report from the commissioner shall be deemed a waiver of all appeal rights under Iowa Code section 89A.13(5). The burden of demonstrating compliance with all applicable statutory provisions, administrative rules, and codes adopted by reference rests upon the petitioning owner or operator.

ITEM 19. Amend subrule 69.1(1), introductory paragraph, as follows:

69.1(1) A petition for reconsideration shall be in writing and must be signed by the requesting party or a representative of that party. The required form for a petition for reconsideration is available on the board’s Web site at <http://www.iowaworkforce.org/labor/elevatorboard.htm>. A petition for reconsideration shall specify:

ITEM 20. Amend subrule 69.1(2) as follows:

69.1(2) A copy of the challenged inspection report shall be attached to the petition for reconsideration. The petitioning party shall also include all relevant documents ~~relevant to the petition for reconsideration~~ that the petitioning party desires the commissioner to consider when evaluating the petition.

ITEM 21. Rescind rule 875—69.2(17A,89A) and adopt the following new rule in lieu thereof:

875—69.2(17A,89A) Appeal to the board. A decision by the commissioner to deny, suspend, or revoke an operating permit; a decision by the commissioner to deny a petition for reconsideration; and a deemed denial of a petition for reconsideration are subject to appeal to the board. At a minimum, an appeal shall include a short and concise statement of the basis for the appeal. The required form for an appeal to the board is available on the board’s Web site at <http://www.iowaworkforce.org/labor/elevatorboard.htm>. An appeal to the board shall be a contested case proceeding subject to the provisions of Iowa Code chapter 17A. The commissioner shall have an automatic right of intervention in any appeal and shall defend the ruling in a contested case proceeding. The deadlines for filing an appeal are set forth below:

69.2(1) Reconsideration of an inspection report. An appeal must be filed in writing with the board within 30 calendar days of the earlier of either the issuance of the commissioner’s written ruling on a petition for reconsideration or the deemed denial of a petition for reconsideration.

69.2(2) Notification of intent to deny, suspend, or revoke an operating permit. An appeal must be filed in writing with the board within 30 calendar days of the appellant’s receipt of the notification of intent to deny, suspend, or revoke an operating permit.

ITEM 22. Amend rule 875—69.3(17A,89A), introductory paragraph, as follows:

875—69.3(17A,89A) Informal review. ~~If the board considers it appropriate, and if requested and consented to by all parties~~ If the appellant requests and the commissioner does not object, the board may

~~grant a voluntary~~ conduct an informal review of the facts and circumstances ~~regarding the inspection report at issue~~, subject to the provisions of this rule.

ITEM 23. Adopt the following **new** subrule 69.3(3):

69.3(3) Rules 875—69.4(17A,89A) through 875—69.31(17A,89A) do not apply during informal review.

ITEM 24. Amend rule 875—69.6(17A,89A) as follows:

875—69.6(17A,89A) Scope of issues. Only those issues raised ~~before the commissioner by the petitioner~~ in the petition for reconsideration will be ~~considered~~ preserved for appeal to the board in an appeal from the denial of a petition for reconsideration or an appeal from the deemed denial of a petition for reconsideration.

ITEM 25. Rescind rule 875—69.7(17A,89A) and adopt the following **new** rule in lieu thereof:

875—69.7(17A,89A) File transmitted to the board. Within 30 days of the issuance of a notice of hearing, the commissioner shall forward to each board member and all parties of record to the appeal copies of the applicable documents set forth below:

1. Inspection report,
2. Petition for reconsideration with the appellant's attachments,
3. Documents obtained by the commissioner in ruling on the petition for reconsideration,
4. Commissioner's ruling on the petition for reconsideration, and
5. Appeal to the board.

ITEM 26. Amend subrule 69.10(3) as follows:

69.10(3) Filing—when required. ~~After the notice of hearing, all documents in a contested case proceeding shall be filed with the board office.~~ All documents that are required to be served upon a party shall be filed simultaneously with the board.

ITEM 27. Amend subrules 69.17(1), 69.17(2) and 69.17(4) as follows:

69.17(1) ~~The~~ Upon the written request of a party, the presiding officer shall, ~~upon the written request of the appellant or the state,~~ issue a subpoena to compel the attendance of witnesses or to obtain evidence which is deemed necessary in connection with a contested case. A command to produce evidence may be joined with a command to appear at deposition or hearing or may be issued separately.

69.17(2) A request for a subpoena shall include the following information, as applicable, ~~unless the subpoena is requested to compel testimony or documents for rebuttal or impeachment purposes:~~

a. to f. No change.

69.17(4) ~~Unless a subpoena is requested to compel testimony or documents for rebuttal or impeachment purposes, the~~ The presiding officer shall mail or otherwise provide copies of all subpoenas to the parties to the contested case. The person who requested the subpoena is responsible for serving the subpoena upon the subject of the subpoena.

ITEM 28. Amend subrule 69.23(10) as follows:

69.23(10) Oral proceedings shall be electronically recorded. Upon request, the board shall provide a copy of the whole or any portion of the audio recording at a reasonable cost. A certified shorthand reporter may be engaged to record the proceeding at the request of a party and at the expense of the party making the request. A transcription of the record of the hearing shall be made at the request of either party at the expense of the party making the request. The parties may agree to divide the cost of the transcription. A record of the proceedings, which may be either the original recording, a copy, or a transcript, shall be retained by the secretary board for five years after the resolution of the case.

ITEM 29. Amend paragraphs **69.23(11)“a”** and **“c”** as follows:

a. If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no ~~adjournment~~ continuance is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

c. Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final board action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by subrule 69.27(3). A motion to vacate must state all facts relied upon by the moving party ~~which~~ that establish ~~that~~ good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact ~~so stated~~ must be substantiated by at least one attached, sworn affidavit of a person with personal knowledge of each such fact, ~~which affidavit(s) must be attached to the motion.~~

ITEM 30. Amend paragraph **69.25(6)“a”** as follows:

a. If the presiding officer determines that disqualification is warranted, the following shall be submitted for inclusion in the record under seal by protective order:

- (1) a ~~A~~ copy of any prohibited written communication,
- (2) ~~all~~ All written responses to the communication,
- (3) a ~~A~~ written summary stating the substance of any prohibited oral or other communication not available in written form ~~for disclosure~~, and all responses made, and
- (4) ~~the~~ The identity of each person from whom the presiding officer received a prohibited ex parte communication ~~shall be submitted for inclusion in the record under seal by protective order; or~~

ITEM 31. Rescind the definition of “Agency” in rule **875—70.1(22,89A)**.

ITEM 32. Amend rule **875—70.1(22,89A)**, definitions of “Confidential record,” “Record” and “Record system,” as follows:

“*Confidential record*” in these rules means a record which is not available as a matter of right for examination and copying by members of the public under applicable provisions of law. Confidential records include records or information contained in records that the agency board is prohibited by law from making available for examination by members of the public, and records or information contained in records that are specified as confidential by Iowa Code section 22.7, or other provision of law, but that may be disclosed upon order of a court, the lawful custodian of the record, or by another person duly authorized to release the record. Mere inclusion in a record of information declared confidential by an applicable provision of law does not necessarily make that entire record a confidential record.

“*Record*” in these rules means the whole or a part of a “public record,” as defined in Iowa Code section 22.1, that is owned by or in the physical possession of ~~this agency~~ the board.

“*Record system*” in these rules means any group of records under the control of the agency board from which a record may be retrieved by a personal identifier such as the name of an individual, number, symbol, or other unique retriever assigned to an individual.

ITEM 33. Amend rule **875—70.2(22,89A)** as follows:

875—70.2(22,89A) Statement of policy. The purpose of this chapter is to facilitate broad public access to open records and sound agency board determinations with respect to the handling of confidential records and the implementation of the fair information practices Act. ~~This agency~~ The board is committed to the policies set forth in Iowa Code chapter 22; the agency board shall cooperate with members of the public in implementing the provisions of that chapter.

ITEM 34. Amend subrules 70.3(1) and 70.3(5) to 70.3(7) as follows:

70.3(1) Location of record. A request for access to a record should be directed to the board at the Department of Workforce Development, Division of Labor Services, 1000 East Grand Avenue, Des Moines, Iowa 50319. ~~If a request for access to a record is misdirected, the request will be promptly forwarded to the appropriate person within the agency.~~

70.3(5) Security of record. No person may, without permission from the custodian, search or remove any record from agency board files. Examination and copying of agency board records shall be supervised by the custodian or a designee of the custodian. Records shall be protected from damage and disorganization.

70.3(6) Copying. A reasonable number of copies of an open record may be made in the agency's board's office. If photocopy equipment is not available in the agency board office where an open record is kept, the custodian shall permit its examination in that office and shall arrange to have copies promptly made elsewhere.

70.3(7) Fees.

a. When charged. The agency board may charge fees in connection with the examination or copying of records only if the fees are authorized by law. To the extent permitted by applicable provisions of law, the payment of fees may be waived when the imposition of fees is inequitable or when a waiver is in the public interest.

b. Copying and postage costs. Price schedules for published materials and for photocopies of records supplied by the agency board shall be prominently posted in agency board offices. Copies of records may be made by or for members of the public on agency board photocopy machines or from electronic storage systems at cost as determined and posted in agency board offices by the custodian. When the mailing of copies of records is requested, the actual costs of such mailing may also be charged to the requester.

c. Supervisory fee. An hourly fee may be charged for actual agency board expenses in supervising the examination and copying of requested records when the supervision time required is in excess of 15 minutes. The custodian shall prominently post in agency board offices the hourly fees to be charged for supervision of records during examination and copying. The hourly fee shall be based upon the pay scale of the employee involved and other actual costs incurred. To the extent permitted by law, a search fee may be charged at the same rate as and under the same conditions as are applicable to supervisory fees.

d. No change.

ITEM 35. Strike "agency" wherever it appears in rules **875—70.5(22,89A)** and **875—70.6(22,89A)** and insert "board" in lieu thereof.

ITEM 36. Amend rule 875—70.7(22,89A) as follows:

875—70.7(22,89A) Consent to disclosure by the subject of a confidential record. To the extent permitted by any applicable provision of law, a person who is the subject of a confidential record may have a copy of the portion of that record concerning the subject disclosed to a third party. A request for such a disclosure must be in writing and must identify the particular record or records that may be disclosed, and the particular person or class of persons to whom the record may be disclosed and, where applicable, the time period during which the record may be disclosed. The person who is the subject of the record and, where applicable, the person to whom the record is to be disclosed, may be required to provide proof of identity. Additional requirements may be necessary for special classes of records. Appearance of ~~counsel~~ an attorney before the agency board on behalf of a person who is the subject of a confidential record is deemed to constitute consent for the agency board to disclose records about that person to the person's attorney.

ITEM 37. Amend paragraphs **70.8(2)"b"** and **"c"** as follows:

b. To a recipient who has provided the agency board with advance written assurance that the record will be used solely as a statistical research or reporting record, provided that the record is transferred in a form that does not identify the subject.

c. To another government agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if an authorized representative of such government agency or instrumentality has submitted a written request to the agency board specifying the record desired and the law enforcement activity for which the record is sought.

ITEM 38. Strike “agency” wherever it appears in rules **875—70.9(17A,89A)**, **875—70.11(22,89A)** and **875—70.12(21,22,89A)** and insert “board” in lieu thereof.

ITEM 39. Amend rule 875—70.13(22,89A) as follows:

875—70.13(22,89A) Applicability. This chapter does not:

70.13(1) Require the agency board to index or retrieve records that contain information about individuals by a person’s name or other personal identifier.

70.13(2) No change.

70.13(3) Govern the maintenance or disclosure of, notification of, or access to records in the possession of the agency board that are governed by the regulations of another agency.

70.13(4) No change.

70.13(5) Make available records compiled by the agency board in reasonable anticipation of court litigation or formal administrative proceedings. The availability of such records to the general public or to any subject individual or party to such litigation or proceedings shall be governed by applicable legal and constitutional principles, statutes, rules of discovery, evidentiary privileges, and applicable rules of the agency board.

ITEM 40. Strike “agency” wherever it appears in rule **875—70.14(17A,22,89A)** and insert “board” in lieu thereof.

ITEM 41. Amend rule 875—70.15(17A,21,22,89A), introductory paragraph, as follows:

875—70.15(17A,21,22,89A) Other groups of records. This rule describes groups of records maintained by the agency board other than record systems. These records are routinely available to the public. However, the agency’s board’s files of these records may contain confidential information. These records may contain information about individuals. These records include: